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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION  
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IN THE MATTER OF U S WEST  
COMMUNICATIONS, INC.'S COMPLIANCE  
WITH § 271 OF THE  
TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. T-00000A-97-0238

**COMMENTS OF QWEST CORPORATION  
ON COMMISSION STAFF'S REPORT  
ON SECTION 272 REQUIREMENTS**

Qwest Corporation ("Qwest") respectfully submits these comments on the Commission Staff's Final Report on Qwest's Compliance With Section 272, dated November 14, 2001 ("Report").

**Introduction**

To receive Section 271 relief, Qwest must demonstrate that its provision of interLATA service "will be carried out in accordance with the requirements of section 272."<sup>1</sup> Section 272 defines the separate structure and business relationship that Qwest must establish with Qwest Communications Corp. ("QCC"), the 272 affiliate designated by Qwest to provide interLATA services following FCC approval.

As the Staff noted in its Report, Sections 272(a) and (b) require QCC to be structurally "separate" from Qwest. Specifically, Section 272(b) requires QCC as the separate affiliate to

<sup>1</sup> 47 U.S.C. § 271(d)(3)(B).

operate independently; maintain separate books, records and accounts in accordance with FCC rules; have separate officers, directors and employees; not to permit a creditor to have recourse to Qwest's assets in case of default; and to conduct all transactions with Qwest at arm's length and reduce any such transactions to writing and make them available for public inspection. 47 U.S.C. §§ 272(b)(1)-(5). Section 272(c) further requires Qwest to account for transactions with QCC in accordance with FCC-approved accounting principles, and prohibits Qwest from discriminating in favor of QCC in the provision of goods and services. *Id.* § 272(c). Section 272(d) requires biennial audits of Qwest's compliance with Section 272 by an independent auditor, following receipt of interLATA authorization. *Id.* § 272(d)(2). Section 272(e) imposes certain non-discrimination and accounting requirements on Qwest concerning telephone exchange and exchange access. *Id.* § 272(e). Finally, Section 272(g) requires that QCC "may not market or sell telephone exchange services provided by [Qwest] unless [Qwest] permits other entities offering the same or similar service" to do so as well. *Id.* § 272(g).

Section 272's structural and transactional separation requirements do not mandate that a BOC and its Section 272 affiliate be wholly unrelated. The 272 affiliate is, of course, an "affiliate," defined in the Communications Act of 1934, as amended, to include an entity "under common ownership or control with" another entity. 47 U.S.C. § 153(1). Accordingly, the FCC has rejected the argument that Section 272 requires "fully separate operations."<sup>2</sup> Indeed, as the

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<sup>2</sup> Third Order on Reconsideration, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 14 FCC Rcd 16,299 ¶ 18 (1999) ("Third Order on Reconsideration") ("such provisions as the arm's length requirement in section 272(b)(5), the nondiscrimination requirement in section 272(c)(1), the Commission's accounting principles implemented in accordance with section 272(c)(2), and the joint marketing provision in section 272(g), suggest that Congress envisioned the type of sharing" contemplated here); *id.* ("the economic benefits to consumers from allowing a BOC and its Section 272

Staff recognized in its Report, the FCC has “specifically approved of sharing of services to derive the economies of scale and scope inherent in the integration of some services.” Report at 35. *See also id.* at 34 (“[T]he FCC has acknowledged that the integration of some services outweigh[s] any potential for harm to competition created thereby and economically benefits consumers by allowing a BOC and its Section 272 affiliate to derive the economies of scale and scope inherent in such an arrangement.”); *id.* at 29. *See Third Order on Reconsideration* ¶ 18; *supra* note 2.

The Staff concluded that “Qwest meets the requirements of Section 272 . . . .” Report at 46. As the Staff noted, following the merger of Qwest Communications International Inc. and U S WEST, Inc. in June 2000, Qwest determined to revisit its predecessor’s prior choice of U S WEST Long Distance, Inc. (subsequently renamed Qwest Long Distance, Inc. (“Qwest LD”)) as the designated Section 272 affiliate. Qwest’s ultimate selection of QCC in January 2001 to be the 272 affiliate of the future was based on QCC’s extensive experience as a facilities-based long distance provider prior to the merger.<sup>3</sup> The Staff correctly and unequivocally rejected AT&T’s suggestion that a principal focus of the Section 272 review of QCC should be on its transactions before it became the 272 affiliate. *See* Report at 26 ¶ 88; AT&T Br. 3. *See also* Report at 31-32 ¶¶ 112-113, 35 ¶ 126.

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affiliate to derive the economies of scale and scope inherent in the integration of some services outweigh any potential for harm to competition created thereby.”).

<sup>3</sup> *In the Matter of U S West Communications, Inc.’s Compliance with § 271 of Telecommunications Act of 1996*, Affidavit of Marie E. Schwartz (March 26, 2001) (“Schwartz Ariz. Direct Aff.”) at 7. Effective on the date of the merger, the FCC required QCC to divest all of its in-region interLATA operations. Memorandum Opinion and Order, *Qwest Communications International, Inc. and U S West, Inc.; Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 5376 (2000).

As demonstrated in Part I below, the Staff's conclusion that Qwest has met each of the foregoing separate affiliate requirements was well supported by the record, and consistent with the FCC's decisions governing Section 272. It was also the conclusion recently reached by the Multistate Facilitator, who concluded — in a report that no party has opposed — that “[t]he record demonstrates that Qwest has met . . . each of the separate affiliate requirements established by section 272 of the Telecommunications Act of 1996,”<sup>4</sup> and by the Nebraska Public Service Commission.<sup>5</sup> As shown in Part II, while the Staff has proposed to review QCC's marketing scripts in advance of its entry into the interLATA market, the FCC has expressly and unequivocally held that such review is not required by Section 272, and such review would handicap the interLATA competition against AT&T and other entrenched interLATA incumbents that the 1996 Act was designed to promote.

#### **I. THE STAFF PROPERLY REJECTED AT&T'S SECTION 272 ARGUMENTS.**

No party other than AT&T has challenged Qwest's showing of compliance with Section 272. Though varied in number, AT&T's arguments take issue with primarily four aspects of Qwest's Section 272 showing: (1) the timeliness of Qwest's accrual and billing of its transactions with Qwest LD and QCC; (2) the requirement that Qwest and QCC have separate officers, directors, and employees; (3) the timeliness and sufficiency of Qwest's Internet postings describing its transactions with QCC; and (4) Section 272(c)'s requirement of

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<sup>4</sup> Facilitator's Report on Group 5 Issues: General Terms and Conditions, Section 272 and Track A Report, filed Sept. 21, 2001, at 7 (“Facilitator's Report”).

<sup>5</sup> See Opinion and Findings, *In the Matter of U S WEST Communications, Inc., Denver, Colorado*, filing its notice of intention to file its Section 271(c) application with the FCC and request for the Commission to verify U S WEST compliance with Section 271(c), Application No. C-1830 (Neb. Pub. Serv. Comm'n Sept. 19, 2001), at ¶ 35.

nondiscrimination.<sup>6</sup> Based on the record evidence, and in light of the foregoing principles, the Staff rejected all of these AT&T arguments. As noted below, these conclusions were clearly justified.

**A. The Timeliness of Qwest's Accruing and Billing for Affiliate Transactions**

One of AT&T's principal claims is that Qwest has failed to show that it would, upon Section 272 approval, accrue and bill for its transactions with QCC on a timely basis. This claim was not based on any demonstration that Qwest is not doing so now, following the transition from Qwest LD to QCC; the record is undisputed that it is.<sup>7</sup> Rather, AT&T's claim is that Qwest has failed to timely accrue or bill for those transactions in the past. Indeed, as the Staff

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<sup>6</sup> The Staff also rejected AT&T's effort to change the subject, to two cases in which the FCC had determined that Qwest's predecessor (U S WEST) had engaged in the provision of in-region interLATA service in violation of Section 271. Report at 26-27, 45. Each of these cases involved FCC interpretation of Section 271's ban on "provid[ing]" such service so as to extend to programs in which the actual transmission was being provided by an independent third party. See Qwest Br. 36-37. As the Staff recognized, these cases do not undermine the record evidence that Qwest accepts the separate subsidiary obligation and stands ready to meet it. These programs "are not really indicative of Qwest's noncompliance with Section 272 requirements," because they related to the threshold question of when Section 271 applies (Report at 26 ¶ 88; see also *id.* at 45 ¶ 168); here, Qwest is itself seeking authority to provide Section 271 services. The Multistate Facilitator reached the same conclusion. See Facilitator's Report at 50.

<sup>7</sup> See Qwest Br. 24-26; *In the Matter of U S West Communications, Inc.'s Compliance with § 271 of Telecommunications Act of 1996*, Rebuttal Affidavit of Marie E. Schwartz (May 29, 2001) ("Schwartz Ariz. Rebuttal Aff.") at 5-6, 8, 13; *In the Matter of U S West Communications, Inc.'s Compliance with § 271 of Telecommunications Act of 1996*, Rebuttal Affidavit of Judith L. Brunsting (May 29, 2001) ("Brunsting Ariz. Rebuttal Aff.") at 5; *In the Matter of U S West Communications, Inc.'s Compliance with § 271 of Telecommunications Act of 1996*, Seven State Collaborative Section 271 Workshop, Transcript, Confidential Version, June 8, 2001 ("6/8/01 MS Confidential Tr.") at 64; *In the Matter of U S West Communications, Inc.'s Compliance with § 271 of Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, Transcript, June 11, 2001 ("6/11/01 Ariz. Tr.") at 112. AT&T conceded that it had identified no untimely accruals following the overlay of Section 272 controls on QCC. See 6/11/01 Ariz. Tr. at 64.

noted, AT&T acknowledged that it had not identified any untimely accruals since Section 272 controls were instituted for QCC. Report at 28 ¶ 99.

With respect to Qwest LD (Qwest's initial Section 272 affiliate for many years), the record makes clear that AT&T's claim is without foundation.<sup>8</sup> With respect to QCC, the record shows that earlier this year Qwest undertook substantial efforts to retool QCC so as to conform its accounting practices to the requirements applicable to a Section 272 affiliate. The Staff agreed that Qwest had addressed the few isolated instances that AT&T had raised alleging a failure to accrue or bill QCC on a timely basis — instances that the Staff properly attributed to “glitches” due to the merger and the redesignation of the 272 affiliate. Report at 28 ¶ 99, 39 ¶ 147, 40 ¶ 151. The Staff properly recognized that the examples raised by AT&T failed to demonstrate that, when it receives Section 271 approval, Qwest's controls will be inadequate to ensure its ability to “prevent, as well as detect and correct” violations of Section 272.<sup>9</sup>

The Staff also noted that if untimely billing or accruals occur in the future, they would be identified in an independent audit or in the biennial audit mandated by Section 272. *Id.* at 28 ¶ 99. As the Staff concluded, “[t]he FCC has found in the context of other Section 271 applications that evidence of the type presented by Qwest in this proceeding . . . provided

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<sup>8</sup> See Qwest Br. 6, 24, 26-28; Brunsting Ariz. Rebuttal Aff. at 5; 6/8/01 Confidential MS Tr. at 70-72, 78-80, 149; 6/11/01 Ariz. Tr. at 80, 91, 96; Multistate Exh. S7-QWE-MES-14.

<sup>9</sup> Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18,354 ¶ 398 (2000) (“SBC Texas Order”); Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 405 & n.1253 (1999), *aff'd sub nom AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) (“BANY Order”).

sufficient assurances that a 272 affiliate maintains its books, accounts, and records in accordance with GAAP.” *Id.* ¶ 100.<sup>10</sup>

The Facilitator in the Multistate Proceeding similarly concluded that Qwest had made “substantial efforts to bring its transactions, both past and current, into compliance with applicable accounting requirements” of Section 272.<sup>11</sup> The Facilitator recommended that Qwest undertake an independent evaluation to provide validation of the results of those efforts, and Qwest has recently done so. This evaluation involved independent third-party testing by KPMG of accounting and billing for transactions between Qwest and QCC reflected on their books from April to August 2001, which included transactions initiated prior to completion of the transition to QCC on March 26, 2001.

On November 15, 2001, Qwest provided the results of this independent test to each of the seven multistate commissions.<sup>12</sup> A copy of the Qwest Submission is being filed in Arizona concurrently with these comments. KPMG concluded that except as noted in its report, Qwest and QCC had complied “in all material respects” with Sections 272(b)(2), 272(b)(5), 272(c)(2), and applicable FCC rules and regulations governing accounting for their transactions with each

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<sup>10</sup> Therefore, the Staff rejected AT&T’s argument that a pre-approval audit should be required. Report at 31-32 ¶ 113. (AT&T had conceded there was no Section 272 justification for such an audit. *See id.* ¶¶ 109, 113.)

<sup>11</sup> Facilitator’s Report at 54.

<sup>12</sup> Qwest’s Submission of Results of Independent Testing, *In the Matter of Investigation into U S WEST Communications, Inc.’s Compliance with § 271 of the Telecommunications Act of 1996*, (filed Nov. 15, 2001) (“Qwest Submission”). The Qwest Submission consists of a cover brief, the KPMG Report, the Affidavit of Judith Brunsting, and the Affidavit of Marie Schwartz. As stated in the Qwest Submission, in accordance with the American Institute of Certified Public Accountants Professional Standards, AT § 9100.56; AU § 339.02-.08; AU § 9339.02 (2000)), KPMG will make the supporting workpapers for the Report available to the Commission for its review, subject to confidentiality restrictions, at a mutually convenient time and location in Arizona.

other. The KPMG Report also served to confirm Qwest's testimony that it had identified untimely accruals and billings or recording of transactions in the course of the transition to QCC. The exceptions to the Report identified only eight examples of such untimely accrual, billing, or recording — every one of which had been previously identified by Qwest and all of which are being corrected.<sup>13</sup> The estimated net financial impact of these untimely bookings, which have been corrected, was actually to *disadvantage* QCC.<sup>14</sup> The overarching goal of Section 272 is to prevent the BOC from subsidizing and discriminating in *favor* of its Section 272 affiliate. Since these exceptions worked to the detriment of QCC, these errors did not reflect either of the global issues Section 272 is designed to address — “improper cost allocation and cross-subsidization between the BOC and its Section 272 affiliate,” and “discriminat[ion] in favor of . . . Section 272 affiliates.”<sup>15</sup> Nor did they reflect any “systemic flaws”<sup>16</sup> in Qwest's Section 272 controls of the

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<sup>13</sup> KPMG's report also identified four transactions in which the price established was not in conformance with the requirements of the FCC's affiliate pricing rules, either because Qwest or QCC had used fully distributed cost rather than fair market value valuations, or because it had calculated fully distributed cost inaccurately. These errors, which have been corrected, involved an estimated net financial impact of only \$21,000. However, as demonstrated in the Qwest Submission, Qwest is undertaking additional training programs designed to ensure proper application of the affiliate pricing rules in the future.

<sup>14</sup> The combined impact of these eight errors was estimated to be \$2.625 million to the *detriment* of QCC. Moreover, one transaction alone accounted for more than 94% of that total; excluding that amount, the estimated net impact was \$146,000 in underbilling of QCC's charges to Qwest. Under the FCC's accounting guidelines, in accordance with RAO Letter 12, DA 90-1491 (rel. Oct. 23, 1990), but for the finding regarding audio conferencing, the other findings together would not be deemed material by the FCC based on its rules for the conduct of affiliate review and the Section 32.27 affiliate transaction rules.

<sup>15</sup> Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Authorization Pursuant to Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Arkansas and Missouri*, CC Docket No. 01-194, FCC 01-338 ¶ 122 (rel. Nov. 16, 2001).

<sup>16</sup> *BANY Order* at ¶ 412.



kind identified by the FCC, since virtually all of these transactions were initiated prior to the efforts undertaken by Qwest to transition to QCC as its Section 272 affiliate as of March 2001. The KPMG review, coupled with the additional actions to be taken by Qwest in light of that review,<sup>17</sup> provides further support for the Staff's conclusion that Qwest has undertaken substantial efforts to retool QCC as its Section 272 affiliate following the March 2001 transition period and that it will have adequate controls for accounting for its transactions with QCC in accordance with FCC rules. As the Staff noted in its Report (at 23 ¶ 71), these controls will also include the FCC's Cost Allocation Manual (CAM) attestation process (due in April 2002) and the protection of the biennial audit, upon which the FCC has previously relied.<sup>18</sup>

#### **B. Separate Officers, Directors, and Employees**

Section 272(b)(3) requires that the 272 affiliate "shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate." 47 U.S.C. § 272(b)(3). There is no dispute that Qwest and QCC have separate officers, directors, and employees. To demonstrate this fact, Qwest presented evidence of an analysis of the lists of officers and directors and of the payroll registers of both entities that demonstrated no such overlap.<sup>19</sup>

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<sup>17</sup> These actions will include additional training and review processes. *See* Affidavit of Judith L. Brunsting (filed with Qwest Submission on Nov. 15, 2001) ("Brunsting MS Affidavit (Nov.)"); Affidavit of Marie E. Schwartz (filed with Qwest Submission on Nov. 15, 2001) ("Schwartz MS Affidavit (Nov.)").

<sup>18</sup> *See* Qwest Submission at 3.

<sup>19</sup> *See In the Matter of U S West Communications, Inc.'s Compliance with § 271 of Telecommunications Act of 1996*, Affidavit of Judith L. Brunsting (March 26, 2001) ("Brunsting Ariz. Direct Aff."), at 12 and Exhs. JLB-5 and JLB-6; Schwartz Ariz. Direct Aff. at 16 (payroll analysis of QC and QCC, identified as "272 Affiliate"); 6/11/01 Ariz. Tr. at 26. AT&T insisted

The Staff properly rejected each of AT&T's arguments with respect to the separate employee requirement. Its recommendation "that Qwest be found to comply with the 'separate officer, director and employee' requirement of Section 272(b)(3)" (Report at 34 ¶ 122) is fully supported by the record and prior FCC Section 271 orders.

### **1. Employee Transfers**

The Staff rejected AT&T's notion that transfers of employees between a BOC and its 272 affiliate violate Section 272. As it noted, Congress and the FCC have made clear that the separate employee requirement simply prohibits *simultaneous* employment by both.<sup>20</sup> The Staff also rejected AT&T's overblown suggestion that the BOC and QCC have a "revolving door atmosphere" that "subverts" the purposes of Section 272(b)(3). AT&T Br. 13. As Qwest demonstrated, and the Staff acknowledged, transfers of approximately 100 employees (out of approximately 49,000 BOC employees and approximately 2000 employees of the Section 272 Affiliate) involved in Qwest's restructuring with its various affiliates do not establish that Qwest is using transfers back and forth in a way intended to or actually causing a compromise of

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that Qwest should have conducted such employee payroll comparisons more frequently. The Multistate Facilitator found that the payroll comparison, along with "a commitment by Qwest to preclude overlap, and a reasonable basis for expecting future Qwest efforts to control overlap," is all that is required. Facilitator's Report at 10, 62-63. The FCC has found a single payroll comparison conducted as part of a 271 application sufficient for these purposes. *BANY Order* ¶ 409 & n.1261; *SBC Texas Order* at ¶ 401 n.1163; see First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21,905 ¶ 178 (1996) ("Non-Accounting Safeguards Order").

<sup>20</sup> Report at 34 ¶ 121. See also *Non-Accounting Safeguards Order* ¶ 178 (separate employee requirement "simply dictates that the same person may not simultaneously serve as an officer, director or employee" of both).

operational independence. Report at 34 ¶ 122.<sup>21</sup> Moreover, the Staff noted that Qwest has “provided significant testimony on the safeguards and procedures it had put into place for employee transfers between the BOC and its Section 272 affiliate” to “eliminate the flow of information and use of proprietary information following transfer of an employee . . . .” *Id.* See Qwest Br. 17-18.<sup>22</sup>

## 2. Shared Services

The Staff also rejected AT&T’s contention that the assignment of BOC employees to projects relating to the 272 affiliate “subverts the purpose of section 272(b)(3).” AT&T Br. 13. The Staff correctly concluded that the provision of shared services, such as payroll administration, do not undermine Qwest’s showing of compliance in this area, given the FCC’s position that “the economic benefits to consumers from allowing a BOC and its section 272

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<sup>21</sup> See also *In the Matter of Investigation into U S WEST Communications, Inc.’s Compliance with § 271 of the Telecommunications Act of 1996*, Seven State Collaborative Section 271 Workshop, Transcript, Public Version, June 7, 2001, (“6/7/01 MS Tr.”) at 158-159, 196.

<sup>22</sup> Though the Staff did not address AT&T’s specific argument regarding a Qwest employee awards program, the Multistate Facilitator correctly rejected AT&T’s “farfetched” concern that the “program will have the effect of causing an employee to spend material time trying to refer customers or save costs for the other company, rather than for the one by whom it is currently employed.” Facilitator’s Report at 62. AT&T’s argument appeared to be that employees of QCC — or apparently even ex-employees of QCC — should not be allowed to participate in a BOC awards program together with their fellow employees. See AT&T Br. 14; *In the Matter of Investigation into U S WEST Communications, Inc.’s Compliance with § 271 of the Telecommunications Act of 1996*, Affidavit of Cory W. Skluzak (May 17, 2001) at 16-18, ¶ 45(f). The Facilitator noted that even if an employee of one affiliate benefits from the success of another, there is nothing nefarious about such a common award program – given the FCC’s determination that providing compensation to an employee of a 272 affiliate based on the performance of the BOC (or vice versa) is not prohibited by Section 272(b)(3). Facilitator’s Report at 61-62. See also *Non-Accounting Safeguards Order* ¶ 186; *id.* ¶ 177 (specifically rejecting AT&T’s argument that it “should prohibit the BOCs from using any compensation system that directly or indirectly bases any part of the compensation of BOC officers, directors, or employees on the performance of the affiliate, or vice versa.”).

affiliate to derive the economies of scale and scope inherent in the integration of some services outweigh any potential for harm to competition created thereby.”<sup>23</sup> Report at 35 ¶ 127.<sup>24</sup>

### **3. Officer Overlap**

The Staff properly rejected AT&T’s challenge based on control of Qwest and QCC by a common parent. The Staff “agree[d] with Qwest that the Act specifically contemplated that the BOC and the 272 affiliate would both have the same parent company,” and noted that the FCC had not prohibited this structure in other Section 271 applications. Report at 33 ¶ 119.

AT&T also questioned the status of an individual officer, Augustine Cruciotti, and claimed that this example cast doubt on Qwest’s ability to comply with Section 272(b)(3). Based on Qwest’s testimony that Mr. Cruciotti has not been an officer, director, or employee of QCC since it became the 272 affiliate,<sup>25</sup> the Staff properly concluded that this issue is now resolved. Report at 36 ¶ 133.<sup>26</sup>

### **C. The Timeliness and Adequacy of Qwest’s Internet Postings of Affiliate Transactions**

Section 272(b)(5) provides that the 272 affiliate “shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm’s length basis with any such

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<sup>23</sup> *Third Order on Reconsideration* ¶ 18.

<sup>24</sup> AT&T conceded that the FCC does not require separate payroll administration. Report at 34-35 ¶ 124; *In the Matter of Investigation into U S WEST Communications, Inc.’s Compliance with § 271 of the Telecommunications Act of 1996*, Seven State Collaborative Section 271 Workshop, Transcript, Public Version, June 8, 2001, (“6/8/01 MS Tr.”) at 25.

<sup>25</sup> 6/8/01 MS confidential Tr. at 265.

<sup>26</sup> The Staff also noted that the impasse issue involving Robin Szeliga, who was not an officer of Qwest when she signed the officer certification, has been resolved by Qwest’s submission of a new certification by Qwest’s controller. Report at 36 ¶ 130.

transactions reduced to writing and available for public inspection.” 47 U.S.C. § 272(b)(5). The FCC rules further require the 272 affiliate “to provide a detailed written description of the asset or service transferred and the terms and conditions of the transaction on the Internet within 10 days of the transaction through the company’s home page.”<sup>27</sup>

There is no dispute in this case that Qwest is posting its transactions with QCC today on a timely basis. Qwest also posted its affiliate transactions with Qwest LD on a timely basis.<sup>28</sup> In addition, Qwest demonstrated that its transaction postings will be sufficiently complete and detailed to satisfy the FCC’s public disclosure requirements. Qwest’s Internet postings contain rates, terms, conditions, frequency, number and type of personnel, and level of expertise<sup>29</sup> — all the components the FCC requires.<sup>30</sup> In addition, all existing work orders and task orders are posted on the QCI home page.<sup>31</sup> Qwest also demonstrated its commitment to make additional billing detail available, subject to a non-disclosure agreement, upon request.<sup>32</sup>

In addressing this question, the Staff properly concluded that Qwest “complies with all applicable requirements at this time.” Report at 38 ¶ 142; *see also id.* at 40 ¶ 154. The FCC has

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<sup>27</sup> Report and Order, *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, 11 FCC Rcd 17,539 ¶ 122 (1996) (“*Accounting Safeguards Order*”).

<sup>28</sup> S7-QWE-MES-13.

<sup>29</sup> Schwartz Ariz. Direct Aff. at 19-24; Schwartz Ariz. Rebuttal Aff. at 10; 6/8/01 MS Tr. at 62. *See generally* Qwest Br. 22-23.

<sup>30</sup> *See BANY Order* ¶ 413.

<sup>31</sup> Schwartz Ariz. Direct Aff. at 23.

<sup>32</sup> S7-QWE-MES-10; 6/8/01 MS Tr. at 61.

rejected AT&T's substantially identical arguments in the past.<sup>33</sup> AT&T has continued to insist, as it did in opposing SBC's successful application for 271 approval in Texas, that BOCs must post individual billing detail and volumes on the Internet.<sup>34</sup> In *SBC Texas*, SBC stated that it did not post "the billing details about individual occurrences of services provided pursuant to its agreements," such as "periodic billing," in light of the competitively sensitive nature of such details; instead, SBC made such information available "under a non-disclosure agreement to interested parties at the headquarters locations" of the BOCs.<sup>35</sup> AT&T's challenge to this practice was explicitly rejected by the FCC,<sup>36</sup> and by the Multistate Facilitator. See Facilitator's Report at 65.<sup>37</sup>

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<sup>33</sup> *SBC Texas Order* ¶¶ 405, 407.

<sup>34</sup> *Id.*; AT&T Br. at 20.

<sup>35</sup> *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas*, Affidavit of Tom Weckel (Jan. 10, 2000) at ¶ 54; see also SBC Brief in Support of Application by Southwestern Bell for Provision of In-Region, InterLATA Services in Texas at 66 (Jan. 10, 2000).

<sup>36</sup> AT&T argued that "details of [the] individual transactions with SWBT" must be disclosed on the 272 affiliates' website, and that "headquarters only" disclosure was inadequate. Robert E. Kargoll Declaration ¶¶ 24, 31 & n.29 (Jan. 31, 2000). The FCC rejected AT&T's concerns, finding that the "nondisclosure agreement has not adversely affected [SBC's] ability to comply with section 272(b)(5) to date because all transactions were properly posted on the Internet." *SBC Texas Order* ¶ 407. Qwest has demonstrated that its Internet postings comply with the FCC's public disclosure requirements, and its willingness to provide access to additional confidential information at its principal place of business is fully consistent with FCC requirements. *Id.* See also *Accounting Safeguards Order* ¶ 122.

<sup>37</sup> The Multistate Facilitator also rejected AT&T's claims that the Section 272 separate affiliate requirements prohibit agreements with indefinite completion dates. As the Facilitator concluded, "AT&T's position finds no support either in commercial practice or in the requirements of the FCC, which do not prohibit agreements of indefinite duration." Facilitator's Report at 67.

#### **D. Future Compliance with Non-Discrimination Requirements**

Section 272(c)(1) provides that a BOC “may not discriminate between . . . [its 272 affiliate] and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards.” 47 U.S.C. § 272(c)(1). Qwest filed testimony affirming that it will comply with all of the nondiscrimination requirements of Sections 272(c) and 272(e).<sup>38</sup> The Staff properly found that there was no evidence to suggest that billing discrepancies noted by AT&T were the result of any preferential treatment; rather, the Staff concluded that the discrepancies were “isolated instances” related to the merger and the redesignation of the 272 affiliate. Report at 40, ¶ 151; *see also id.* at 28 ¶ 99, 39 ¶ 147. The

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An “indefinite completion date” is nothing more than a reflection of the fact that the underlying agreement for services continues in effect until terminated by either party. *See* Master Services Agreement, *available at* [http://www.qwest.com/about/policy/docs/qcc/MSA\\_qcc.html](http://www.qwest.com/about/policy/docs/qcc/MSA_qcc.html) (“This Agreement shall become effective as of January 19, 2001 and will remain in full force and effect until either party provides sixty (60) calendar days written notice of termination to the other party.”) In this respect, the description is plainly accurate — and similar to that employed by other BOCs. *See* Coordination Agreement provided by BellSouth Telecommunications, Inc. to BellSouth Long Distance, Inc., *available at* <http://bellsouthcorp.com/policy/transactions/coordinationsum.vtml> (“There is no specific definable expiration date for the contract, but thirty (30) days written notice is one of the requirements for termination of the agreement as outlined in the opening paragraph of the Coordination Agreement.”); Mutual Services Agreement by and between Illinois Bell Telephone Company and Ameritech Communications, Inc., *available at* <http://www1.Ameritech.com/corporate/regulatory/contract12.html> (“This Agreement may be terminated by either party by giving reasonable written notice to the other party in advance of the effective date of termination.”); General Services Agreement between Michigan Bell Telephone Company and SBC Advanced Solutions, Inc., *available at* <http://www.sbc.com/PublicAffairs/PublicPolicy/Regulatory/affdocs/GSA-MI.doc> (“This Agreement will become effective when executed by both parties and will continue in full force and effect until terminated by either party upon thirty (30) days' prior written notice.”).

<sup>38</sup> Schwartz Ariz. Direct Aff. at 25-30.

Staff noted that if any evidence indicating a “systemic or recurring problem” arose, such evidence could be brought before the Commission.<sup>39</sup>

## **II. THE FCC HAS MADE CLEAR THAT REVIEW OF MARKETING SCRIPTS IS NOT NECESSARY FOR SECTION 272(g) COMPLIANCE.**

Qwest respectfully disagrees with the Staff’s suggestion that “it would be appropriate for the ACC Staff to review and approve marketing scripts for compliance with Section 272(g).” Report at 44 ¶ 173. Qwest challenges only this provision of the Report.

Section 272(g) imposes only two limitations with respect to marketing: the 272 affiliate may not market the BOC’s local exchange service unless the BOC permits the affiliate’s competitors to do the same, and the BOC cannot market the affiliate’s in-region interLATA services unless the BOC has received Section 271 approval. 47 U.S.C. § 272(g)(1), (2). Both Qwest and QCC have demonstrated their commitment to compliance with Section 272(g)’s requirements,<sup>40</sup> and neither of these restrictions is at issue here.

Moreover, the statute expressly contemplates joint marketing and sale of services (*id.* § 272(g)(3)), but does not provide for review of marketing scripts. Even AT&T conceded that such review would constitute “a higher standard [for] Qwest.”<sup>41</sup> This is not surprising. As the Staff noted (Report at 44 ¶ 172), the FCC has clearly rejected similar AT&T efforts to review

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<sup>39</sup> The Staff also rejected AT&T’s challenge to services that Advanced Technologies, a non-BOC affiliate, had provided to Qwest LD. The Staff noted that the plain language of Section 272(c) did not apply to transactions between a 272 affiliate and any affiliate other than the BOC. Report at 41 ¶ 158.

<sup>40</sup> Brunsting Ariz. Direct Aff. at 18-19; Schwartz Ariz. Direct Aff. at 33-34; 6/11/01 Ariz. Tr. at 19.

<sup>41</sup> 6/8/01 MS Tr. at 166.



BOC interLATA marketing scripts: "We do not require applicants to submit proposed marketing scripts as a precondition for Section 271 approval, nor do we expect to review revised marketing scripts on an ongoing basis once Section 271 authorization is granted. Applicants are free to tell us how they intend to joint market, although we do not require them to do so."<sup>42</sup>

There is no basis for applying any different standard to Qwest here. Indeed, to do so would be inconsistent with the goal of Section 271 to promote competition in long distance services. Once a BOC meets Section 271's competition requirements in the local market, only certain limitations with respect to cross-subsidization and discrimination apply to its affiliate's entry as a competitor in the long distance market. Requiring prior review and approval of marketing scripts would constrain QCC's ability to compete as a new entrant in that market, hampering competition and giving further advantage to entrenched long distance providers such as AT&T. The FCC's considered judgment is thus supported by compelling public policy concerns. Therefore, Qwest challenges only the determination in the Report that Qwest must submit its marketing scripts for prior review and approval.

### Conclusion

For the reasons stated above and in the Staff's Report, the Commission should adopt the Staff's conclusions that "Qwest meets the requirements of Section 272 . . . ." (Report at 46), and should not require prior review and approval of Qwest's marketing scripts.


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<sup>42</sup> Memorandum Opinion and Order, *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in South Carolina*, 13 FCC Rcd 539 ¶ 236 (1997) ("BellSouth South Carolina Order"). See also *BANY Order* ¶ 419 ("We reject as inconsistent with Commission precedent AT&T's contention that Bell Atlantic must submit proposed marketing scripts in order to demonstrate compliance with section 272(g)."); *Brunsting Ariz. Direct Aff.* at 18-19.

DATED this 26<sup>th</sup> day of November, 2001.

Respectfully submitted,

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